(1)

Supreme Court, U.S.
FILED

021391 MAR 17 2003

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

RONALD JOSEPH MAYFIELD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

PETITION FOR A WRIT OF CERTIORARI

MITCHELL Y. MIRVISS
Counsel of Record
MICHAEL SCHATZOW
TRACEY COHEN PALIATH
VENABLE, BAETJER AND HOWARD, LLP
1800 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201
(410) 244-7400

Attorneys for Petitioner

179661

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

48 pp

QUESTION PRESENTED

Did the Circuit Court for Prince George's County, Maryland err in denying Petitioner's petition for post-conviction relief where the trial court granted the public defender's motion to withdraw but failed to inquire whether the defendant was making a knowing and voluntary waiver of his right to counsel; and his trial counsel entered her appearance on the day of trial; was deemed ineffective by the motions judge who denied both her motion for continuance and the public defender's motion to withdraw from the case; had approximately one hour to prepare for trial.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
TABLE OF APPENDICES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. BACKGROUND	3
II. THE PRE-TRIAL HEARING	3
III. THE TRIAL	9
IV. DIRECT APPEAL	10
V. STATE POST-CONVICTION REVIEW	11
REASONS FOR GRANTING THE WRIT	12

Contents

Page

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE CIRCUIT COURT FOR PRINCE GEORGES COUNTY, MARYLAND DECIDED THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DEFENDANT RECEIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL IN CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT. 12

A. This Court Should Correct The Post-Conviction Court's Decision, In Conflict With the Decisions Of This Court, That The Facts Of This Case Did Not Demonstrate The Denial Of The Fundamental Rights To Due Process And Counsel. 13

B. The Post-Conviction Court Analyzed Petitioner's Claims That He Was Denied The Right To Counsel And Due Process Under The Incorrect Standard Using Erroneous Facts And Therefore Affirmed Petitioner's Conviction In Conflict With This Court's Decisions. 16

CONCLUSION 25

TABLE OF CITED AUTHORITIES

FEDERAL CASES *Page*

Avery v. Alabama, 308 U.S. 444 (1940) 18

Brady v. United States, 397 U.S. 742 (1970) 22

Brewer v. Williams, 430 U.S. 387 (1988) 23

Faretta v. California, 422 U.S. 806 (1975) 22, 23

Gideon v. Wainwright, 372 U.S. 335 (1963) 12, 16

Godinez v. Moran, 509 U.S. 389 (1993) 22

Johnson v. Zerbst, 304 U.S. 458 (1938) ..... *passim*

MacKay v. Carberry, 238 F. Supp. 856 (N.D. Cal. 1965) 24

McMann v. Richardson, 397 U.S. 759 (1970) 16

Powell v. Alabama, 287 U.S. 45 (1932) 16, 17, 18

Strickland v. Washington, 466 U.S. 668 (1984) ... *passim*

Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996) 21

United States v. Cronic, 466 U.S. 648 (1984) .... *passim*

United States v. Hall, 843 F.2d 408 (10th Cir. 1988) 18

Wise v. Bowersox, 136 F.3d 1197 (8th Cir. 1998) .. 22

Cited Authorities

Page

STATE CASE

Moten v. State, 339 Md. 407, 663 A.2d 593 (1995) 23

UNITED STATES CONSTITUTION

Fifth Amendment 1

Sixth Amendment 2, 16

Fourteenth Amendment 2

STATUTE

28 U.S.C. § 1257 1

RULES

Maryland Rule of Criminal Procedure 4-215 ..10, 23, 24

Maryland Rule of Professional Conduct 1.16 19

TABLE OF APPENDICES

Page

Appendix A — Opinion And Order Of The Circuit Court For Prince George's County, Maryland Dated August 20, 2002 ..... 1a

Appendix B — Order Of The Court Of Special Appeals Of Maryland Denying Application For Leave To Appeal Dated And Filed December 16, 2002 ..... 14a

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Circuit Court for Prince George's County.

OPINIONS BELOW

The August 20, 2002 opinion of the Circuit Court for Prince George's County, Maryland, *McKee, J.*, denying post-conviction relief is unreported and is included in the Appendix filed herewith. App. at A. The December 16, 2002 order of the Court of Special Appeals of Maryland denying the application for leave to appeal the circuit court's denial of post-conviction relief is unreported and is included in the Appendix filed herewith. App. at B.

STATEMENT OF JURISDICTION

The order of the Court of Special Appeals of Maryland denying the application for leave to appeal the circuit court's denial of post-conviction relief was entered on December 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution reads in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution reads in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Ronald Joseph Mayfield has been sentenced to twelve years' incarceration by the State of Maryland. Mayfield was convicted of breaking into and stealing computer and electronic equipment from a business in Laurel, Maryland. As described more fully herein, Mayfield's conviction was based solely on circumstantial evidence. At trial, Mayfield was represented by a lawyer who: entered her appearance that same day after having only a brief discussion about the case with him a couple of days before; reasonably believed that she was appearing at a motions hearing, and had not prepared for trial; was denied a motion for continuance of the trial date by the motions judge, who also concluded that she would be ineffective counsel at trial and therefore required that the public defender who had previously entered her appearance remain in the case. Since the moment of his arrest, Mayfield has maintained that he did not break into or rob First Financial.

I. BACKGROUND

On the morning of April 24, 1999, First Financial Resources, Inc. ("First Financial"), located in Laurel, Maryland, was forcibly entered by the breaking of a window and burglarized. William Ray Miller, the owner/operator of First Financial, testified that two computer systems, a VCR/TV, and an AM/FM radio were removed from the premises. Trial tr. at 80. The burglar apparently entered the premises by breaking a window.

On June 22, 1999, the State of Maryland filed criminal charges against Mayfield for burglary, theft, and malicious destruction of property relating to the First Financial burglary. Mr. Mayfield was represented at his preliminary hearing by the Office of the Public Defender, and on June 28, 1999, his case was assigned to Assistant Public Defender Melanie Fishkind. Trial was set for September 30, 1999.

II. THE PRE-TRIAL HEARING

On September 3, 1999, Mr. Mayfield appeared at a motions hearing with his counsel, Ms. Fishkind. At that time, Mr. Mayfield requested, and was granted, leave to seek paid counsel to replace Ms. Fishkind. The court then indicated it would continue the motions hearing until September 10, but Ms. Fishkind indicated that she would be unable to attend on that date. The court next suggested the motions hearing be rescheduled to September 17, but the prosecutor stated that that date would not work for the State because the arresting officer, a lead witness, would be out of the country and unavailable for three weeks, so she would have to move for a continuance at that time. Moreover, because the officer's training would not be concluded by the September 30 trial

date, the prosecutor told the court that she would have to continue the trial date as well. The court therefore continued the pending motions until September 30, the trial date, and told the prosecutor that at that time she could continue "everything" (i.e., the motions and the trial) to another date. The court kept Ms. Fishkind's appearance entered until new counsel made his or her appearance. The transcript from the September 3rd conference makes this clear:

> MR. MAYFIELD: Your Honor, I just felt, based on the evidence, I felt I shouldn't be here at this point with evidence, the things in my case, you know, which I can't talk about, you know, but I just felt I shouldn't be here at this point in this situation.
>
> THE COURT: Well, I don't understand it. You mean you shouldn't be here on a motion to suppress? Where should you be?
>
> MR. MAYFIELD: I am saying based on the evidence, you know –
>
> THE COURT: The Grand Jury indicted you. That has nothing to do with Ms. Fishkind.
>
> MR. MAYFIELD: That was my concern, Your Honor. If I can have another lawyer, a paid lawyer.
>
> THE COURT: You can have a paid lawyer.
>
> MS. FISHKIND: The trial is set for September 30th. I am in sort of an awkward position. I know the State has got in their witnesses here and are

ready to go. If Mr. Mayfield wanted to hire a private attorney and continue the motion, but –

THE COURT: I will give you one week. I will continue it for one week, Mr. Mayfield, for you to get a private lawyer.

MS. FISHKIND: Your Honor, the 10th would be a very bad day for me.

THE COURT: Do you want to get a private attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have the number of the Gray Panel?

MS. FISHKIND: 952-4112?

THE COURT: Those are lawyers that take cases below the going rate. I will continue it until the 17[th of September].

PROSECUTOR: Your Honor, my officers told me that [the arresting officer, a key witness] will be in Germany, and this officer will be in three-week school.

THE COURT: When?

PROSECUTOR: I didn't know about him until yesterday, *so I am going to have to continue the trial date, it looks like.*

> THE COURT: I will continue the motions to the day of the trial, which will be the 30th, is that correct?
>
> PROSECUTOR: Yes.
>
> THE COURT: *And then at that time you can continue everything then.* Ms. Fishkind, the Public Defender, will stay in the case until a new attorney gets in.

(9/3/99 motions hearing tr. 7-9) (emphasis added). On September 19, the prosecutor filed a short written request for continuance, and this was denied by the court on September 23. There is no evidence in the record that Mr. Mayfield was ever apprised of this order.

On or about September 28, Mr. Mayfield retained Johnine Clark to represent him in connection with the charges against him. He met Ms. Clark for the first time on the morning of September 30, when they appeared for what they believed was a motions hearing. Mr. Mayfield and Ms. Clark soon realized, however, that the court intended to proceed with Mr. Mayfield's trial that same day. Having only spoken to Mr. Mayfield about the case for a little more than one hour, 7/2/02 post-conviction hrg. tr. 53-54, and having had no opportunity to review the case file, Ms. Clark requested a continuance.

The motions judge, the Honorable E. Allen Shepherd, stated that he would not continue the trial date, and therefore would not allow Ms. Fishkind, as the prepared defense lawyer, to withdraw from the case. The transcript of that hearing demonstrates that the court recognized that Ms. Fishkind's withdrawal of her appearance and the entry

of appearance of new, unprepared counsel would unacceptably compromise Mr. Mayfield's ability to put forward a defense:

> MS. FISHKIND: Your Honor, Melanie Fishkind on behalf of Mr. Mayfield. My appearance had been entered in this case. However, as you can see, private counsel is entering her appearance today.
>
> THE COURT: Okay.
>
> MS. FISHKIND: I'm asking the court to strike my appearance and enter the appearance of [Ms. Clark's] office.
>
> THE COURT: Today's the trial date?
>
> THE PROSECUTOR: Yes.
>
> THE COURT: Are you ready for trial?
>
> THE PROSECUTOR: Yes, Your Honor. The state is ready. My witnesses are present.
>
> THE COURT: I'm not going to continue the case.
>
> MS. FISHKIND: Your Honor, I believe since a private attorney has entered an appearance, though, that my appearance should be stricken.
>
> THE COURT: No. I'm going to deny the motion to continue.
>
> MALE VOICE: (inaudible).

THE COURT: *No, I mean this would necessitate a, you know, a delay in the trial to allow new counsel to enter and you to withdraw.*

MS. FISHKIND: But, Your Honor, if the counsel and the defendant are ready to go today then may my appearance be stricken?

THE COURT: Only in that event.

MS. FISHKIND: Then would you –

THE COURT: Are you [Ms. Clark] prepared to try the case?

MS. CLARK: Your Honor, I would have been asking for a continuance, but I think – [Johnine] Clark on behalf of Mr. Mayfield. I think the question or problem that arose was because the last time that Mr. Mayfield was before Judge Casula [on September 3] he had said that he was unhappy with his counsel at that time.

THE COURT: Right.

MS. CLARK: And Judge Casula had said that he needed to get a new counsel for today, and I think my client understood that to mean that he was just supposed to have new counsel here today, not that counsel necessarily had to be retained and prepared for today.

(9/30/99 hearing on mot. to dismiss counsel and continue trial date tr. 2-3) (emphasis added).

Because he recognized that forcing Mr. Mayfield to go to trial with unprepared counsel would be constitutionally infirm, Judge Shepherd denied both Ms. Clark's request for continuance *and* Ms. Fishkind's request to withdraw from the case. In accordance with Judge Shepherd's order, both Ms. Fishkind and Ms. Clark reported to the courtroom of the Honorable C. Philip Nichols for Mr. Mayfield's trial on the merits.

III. THE TRIAL

When Judge Nichols began the proceedings on the merits, Ms. Clark entered her appearance and Ms. Fishkind asked Judge Nichols for permission to withdraw from the case, despite: (1) Judge Shepherd's earlier admonition that she could only withdraw if Ms. Clark was prepared to try the case; (2) Ms. Clark's statements that she was not prepared for trial; (3) Ms. Fishkind's independent knowledge – based on the fact that she had never spoken to Ms. Clark about the case and had not yet given Ms. Clark the case file – that Ms. Clark was not prepared to try the case; and (4) Judge Shepherd's finding that Ms. Clark was not prepared for trial. Despite these facts, Ms. Fishkind asked the trial judge to strike her appearance:

> MS. FISHKIND: Your Honor, at this time, since private counsel has entered, I'd ask that the appearance of the Public Defender be stricken and my appearance in particular be stricken.
>
> THE COURT: Any objection?
>
> MS. CLARK: No, Your Honor.

> THE COURT: No objection, withdrawal of appearance is granted.

(9/30/99 trial tr. 2). Jury selection for Mr. Mayfield's trial began immediately thereafter.

Ms. Clark's failure to object to Ms. Fishkind's withdrawal from the case forced Mr. Mayfield to go to trial with new counsel wholly unfamiliar with either the facts or the law of this matter. By allowing Ms. Clark to try the case – especially in light of Judge Shepherd's finding that she was ineffective – Mr. Mayfield was denied his right to counsel. The court made *no* inquiry to determine whether Mr. Mayfield was willing to waive his right to counsel by having Ms. Clark represent him, and, if he was making such a waiver, whether it was knowing and voluntary. The trial court even failed to follow Maryland Rule of Criminal Procedure 4-215, which provides mandatory procedures the court must follow when counsel withdraws from a case. The record reflects that Judge Nichols did not conduct the Rule 4-215 waiver inquiry – nor indeed any inquiry of any kind – to determine if Mr. Mayfield was knowingly and voluntarily waiving his right to effective assistance of counsel.

The jury found Mr. Mayfield guilty on all counts. Immediately after taking the jury's verdict, Judge Nichols sentenced Mr. Mayfield to a fifteen year term of imprisonment.

IV. DIRECT APPEAL

Mr. Mayfield moved for a new trial and a reduction of his fifteen year sentence. On February 24, 2000, the trial judge

denied Mr. Mayfield's motion for a new trial, but granted in part his motion for reduction or modification of sentence and reduced Mr. Mayfield's sentence to twelve years.

Mr. Mayfield appealed his conviction to the Court of Special Appeals of Maryland. First, he asserted that Ms. Clark's representation of him at trial violated his constitutional right to counsel. Second, Mr. Mayfield asserted that the trial court erred when it failed to instruct the jury regarding the presumption of innocence and the State's burden to prove the case beyond a reasonable doubt. Third, Mr. Mayfield asserted that the trial court erred in sentencing him for both felony theft and misdemeanor theft. The Court of Special Appeals affirmed the judgment of the trial court as to the first two issues and, as the State had conceded error as to the third issue, merged for sentencing purposes Mr. Mayfield's conviction for misdemeanor theft with the conviction for felony theft. The Court of Appeals of Maryland subsequently denied Mr. Mayfield's request for a writ of certiorari to review the decision of the Court of Special Appeals.

V. STATE POST-CONVICTION REVIEW

Mayfield filed a petition for State post-conviction relief in the Circuit Court for Prince George's County, Maryland, which, following an evidentiary hearing, was denied. As discussed more fully herein, the state post-conviction court premised its denial of post-conviction relief on facts that either the State admitted were not accurate and/or were wholly contrary to the evidence adduced at trial.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE CIRCUIT COURT FOR PRINCE GEORGES COUNTY, MARYLAND DECIDED THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DEFENDANT RECEIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL IN CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT.

In deciding that Mr. Mayfield under these circumstances received a trial consistent with the Constitution, the Circuit Court for Prince George's County, Maryland decided an important federal question (*i.e.*, whether Mr. Mayfield's rights to due process and counsel were violated) in direct conflict with long-standing precedent of this Court. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *United States v. Cronic*, 466 U.S. 648, 656-57 (1984); *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

It is clear that the state court's decision in this case involved the most essential of constitutional rights – the right to counsel at trial. *See United States v. Cronic*, 466 U.S. at 654 (1984) ("'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have'") (citation omitted). Here, the court decided, in conflict with *Gideon*, 372 U.S. at 343-45, *Cronic*, 466 U.S. at 658, *Strickland*, 466 U.S. at 687, *Johnson v. Zerbst*, 304 U.S. at 468 and their progeny, that Mayfield was not denied his right to counsel. A review of the evidence in

this case demonstrates otherwise. For that reason, the Court should grant the petition for writ of certiorari.

A. This Court Should Correct The Post-Conviction Court's Decision, In Conflict With the Decisions Of This Court, That The Facts Of This Case Did Not Demonstrate The Denial Of The Fundamental Rights To Due Process And Counsel.

As a threshold matter, the State post-conviction court's decision was wrong because it was premised on facts that either the State admitted were not accurate and/or were wholly contrary to the evidence adduced at trial.

The state post-conviction court stated that "[p]olice responded to a burglar alarm and found Petitioner removing computer equipment," App. 6a, that "he was caught red-handed," App. 8a, and that "[t]here was a mountain of damning evidence against him, including the fact that the police caught him on the scene at the time of the burglary removing property that did not belong to him." App. 9a. The post-conviction court simply had the facts wrong. Neither the responding officers, nor any other witness, testified that they saw Mr. Mayfield inside of, or leaving, First Financial, or that he had any computer equipment with him.

Both officers testified that when they arrived at First Financial, petitioner was standing outside of his car. Officer Robert A. Reid testified that, upon responding to the alarm at First Financial, he observed the defendant "at the back of [the defendant's] car" and that "as soon as [I] got out of the [patrol] vehicle I saw the subject that was standing near it walked toward me." 9/30/99 trial tr. 48. Officer John Simms

testified that when he responded to the scene, he "observed the defendant, a white item in his hand coming from the trunk of the car. At that point he immediately walked over toward Pfc. Reid." *Id.* at 72. Officer Simms acknowledged that neither he nor Officer Simms investigated what the "white item" was or whether there had actually been a break-in at First Financial. *Id.* at 74-75.

In fact, Officer Reid testified that he never saw Mr. Mayfield inside, or coming out of, the First Financial building, or in possession of any equipment. *Id.* at 67. The police officers were so unconvinced of Mr. Mayfield's involvement in any break-in at First Financial that they allowed him to leave the scene as soon as he produced identification and the dispatcher indicated to the officers that his record was clear. *See id.* at 56-57, 67. In addition to the testimony of the responding officers, the State admitted that Mr. Mayfield was never seen with any of property stolen from First Financial. *See* July 15, 1999 Discovery Without Request produced by Assistant State's Attorney Stephen O. Russell (stating that "information tending to negate or mitigate the guilt or punishment of the defendant as to any offense charged is set forth as follows: The defendant was not seen in possession of any stolen property.")

In addition, despite the post-conviction court's finding that Mr. Mayfield's fundamental constitutional right to counsel was not violated because it was his own fault that he had unprepared trial counsel, *see* App. 9a (stating that Petitioner "chose to sit on his hands" between September 3 and September 30), the record is to the contrary. The transcript of the September 3 hearing reveals that Mr. Mayfield reasonably believed that the motions hearing was continued to September 30, at which time a trial date

would be set. *See* 9/30/99 trial tr. at 7-8 (pp. 4-6, *supra*). Moreover, Mr. Mayfield testified at the post-conviction hearing that he began contacting "gray panel" lawyers on the same day that the court granted him leave to hire a paid attorney, but that the lawyers he contacted were either too expensive or told him that they would be unable to represent him. *See* 7/02/02 post-conviction tr. 25-26. In fact, it was only with the assistance of his pastor that Mr. Mayfield was able to find counsel who could represent him. *Id.*

Because the State post-conviction court determined (based on incorrect facts) that "[t]his was in every regard an open and shut case," App. 12a, and that there was not "one scintilla of evidence" to support the belief that "the outcome of [petitioner's] trial would have been different had Ms. Clark been more prepared," App. 8a, it dismissed Ms. Clark's testimony (which it believed) that "she felt unprepared" in trying Mr. Mayfield's case. App. 8a. The post-conviction court turned a blind eye to the substantial evidence that Mr. Mayfield's constitutional rights were violated by Ms. Clark's representation of him at trial because it was thoroughly convinced of Mr. Mayfield's guilt. As a result, the post-conviction court failed to recognize that Mr. Mayfield had been constructively denied the right to counsel at his trial, failed to apply the correct standard to Mr. Mayfield's ineffective assistance of counsel claims (that of *United States v. Cronic*), and wrongly analyzed the evidence under the incorrect standard that it did apply (*Strickland v. Washington*).

B. The Post-Conviction Court Analyzed Petitioner's Claims That He Was Denied The Right To Counsel And Due Process Under The Incorrect Standard Using Erroneous Facts And Therefore Affirmed Petitioner's Conviction In Conflict With This Court's Decisions.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This protection is applicable to state, as well as federal, criminal proceedings. *See Gideon*, 372 U.S. at 344-45 (1963). The Supreme Court has long recognized the paramount importance of the right to effective assistance of counsel. *See Cronic*, 466 U.S. at 653 (quoting *Gideon*, 372 U.S. at 344 ("[l]awyers in criminal cases 'are necessities, not luxuries.'")). *See also Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *Johnson*, 304 U.S. at 468 (1938). The Supreme Court has recognized that merely having a lawyer present is not sufficient to satisfy the defendant's constitutional right to counsel. *See Strickland*, 466 U.S. at 685. Rather, the Court has held that "the right to counsel is the right to *effective* assistance of counsel." *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970) (emphasis supplied).

In *Strickland*, 466 U.S. at 686, the Court stated that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having a fair result." The *Strickland* analysis requires that a petitioner demonstrate that counsel's performance was "deficient," and that the deficient performance "prejudiced the defense." *Id.* at 687. Usually,

this requires the court to examine the specific performance of counsel. *Id.* at 699. However, if counsel represented petitioner at trial, but the circumstances were such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659-60. As *Strickland* itself recognized, a habeas petitioner is entitled to such a presumption when an "[a]ctual or constructive denial of the assistance of counsel altogether" has occurred. *Strickland*, 466 U.S. at 692.

The facts of this case demonstrate that Mr. Mayfield was constructively denied his right to counsel. Mr. Mayfield went to trial represented by a lawyer who had entered her appearance on the day of trial, had only spoken to him for approximately one hour, and had no opportunity to review a case file, perform an investigation, or secure defense witnesses.

Mr. Mayfield's predicament resembles that of the defendants in *Powell*, which the *Cronic* court cited as an example of a situation where the defendants were entitled to the presumption of prejudice. In *Powell*, the trial court appointed "all members of the bar" to represent the defendants. Although on the day of trial a lawyer entered an appearance on behalf of the defendants in the case, he stated that he had not had the opportunity to prepare the case and was therefore unwilling to represent the defendants on such short notice. The trial court decided that the lawyer would represent the defendants at trial anyway. In reviewing the defendants' convictions in that case, the Supreme Court concluded that the defendants were effectively denied counsel at their trial regardless of their lawyer's presence because

they were "'put in peril of their lives *within a few moments* after counsel for the first time charged with any responsibility began to represent them.'" *Cronic*, 466 U.S. at 660 (quoting *Powell*, 287 U.S. at 57-58). Here, Mr. Mayfield was put in peril when his trial began immediately after Ms. Clark, who had talked to him for a total of approximately one hour, and never reviewed the case file or arranged for defense witnesses to testify, entered her appearance and represented him at trial.

The cases in which the *Cronic* presumption of prejudice has been denied are easily distinguishable from the facts present in this case. Courts have held that a defendant was not entitled to a presumption of prejudice when new counsel was appointed *three days* before trial, *see Avery v. Alabama*, 308 U.S. 444, 452 (1940), or when defendant's counsel entered an appearance *three weeks* before trial and "was given the full cooperation of [defendant]'s prior counsel who had spent over two months assimilating the facts of the case." *United States v. Hall*, 843 F.2d 408, 412 (10th Cir. 1988). Here, the withdrawal of Ms. Fishkind, the prepared lawyer, and the entry of appearance of Ms. Clark, who had just met Mr. Mayfield that morning, occurred simultaneously, on the day of trial. *See* 9/30/99 trial tr. 2-3. Ms. Clark and Ms. Fishkind never discussed the case, and Ms. Clark did not receive Ms. Fishkind's case file until the day of trial. *See* 7/02/02 post-conviction hrg. tr. at 55.

In addition, in the course of a two-minute motions hearing, Judge Shepherd determined that Ms. Clark was not prepared to represent Mr. Mayfield at trial that day. Judge Shepherd denied Ms. Clark's request for a continuance *and* Ms. Fishkind's request to strike her appearance from the case, noting that if Ms. Fishkind's appearance were stricken, he would be required to grant a continuance to allow new

counsel to prepare for trial. Implicit in this ruling is Judge Shepherd's conclusion, based on his understanding of the situation and Ms. Clark's own admission, that Ms. Clark could not provide effective assistance of counsel to Mr. Mayfield because she had just been retained. As Judge Shepherd explained to Ms. Fishkind in denying her request to strike her appearance, "only in th[e] event" that Ms. Clark and Mr. Mayfield were ready to proceed to trial that day would he strike her appearance. Judge Shepherd then refused to strike Ms. Fishkind's appearance from the case because he did not believe that Ms. Clark could effectively represent Mr. Mayfield at trial. In so ruling, Judge Shepherd made a finding that Ms. Clark's representation of Mr. Mayfield at the trial on the merits would constitute ineffective assistance of counsel.

In this case, Ms. Fishkind, who was Mr. Mayfield's counsel until moments before his trial, knew Ms. Clark was not prepared to go trial, but nonetheless withdrew her appearance as counsel. Ms. Fishkind got Judge Nichols, the trial judge, to withdraw her appearance even though Judge Shepherd, the motions judge, had just told her that she could not withdraw because Ms. Clark was unprepared to try the case. Simply stated, Ms. Fishkind allowed her client to proceed to trial with counsel unfamiliar with either the facts or law of the case, despite her professional obligations to him. *See* Maryland Rule of Professional Conduct 1.16 ("except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse affect on the interest of the client . . ."); *see also* Commentary to Maryland Rule of Professional Conduct 1.16 (if a client seeks to discharge counsel, the client should be given a full explanation of the consequence). Because these facts demonstrate that

Mr. Mayfield was constructively denied assistance of counsel at trial, the state post-conviction court should have assumed prejudice to his case under *Cronic*.

Even if the court were to find no *presumption* of prejudice under *Cronic* and applied the *Strickland* standard to the facts of this case, Ms. Clark's performance at trial demonstrates that Mr. Mayfield was prejudiced by her representation and was therefore denied the right to effective assistance of counsel in violation of his constitutional rights.

The post-conviction court concluded that because Ms. Clark "was not trying to build an alibi defense" for Mr. Mayfield, App. 8a, her representation of Mr. Mayfield was not "deficient," under *Strickland*. Given that Ms. Clark tried the case immediately after entering her appearance, and the entirely circumstantial nature of the state's case, the post-conviction court's assessment of what effective counsel should have had the opportunity to do in this case is simply incorrect.

At the post-conviction hearing, Ms. Clark herself enumerated the numerous ways in which her preparation for, and performance at, trial were ineffective. *See* post-conviction tr. at 51-59. Ms. Clark testified that she had not done any work on the case and was not prepared to present Mr. Mayfield's defense on the day of trial. *Id.* at 51. She testified that she had only spoken with Mr. Mayfield for approximately one half hour two days prior to September 30 and had been informed by Mr. Mayfield that only pre-trial motions, but not trial, were scheduled for September 30. *Id.* Ms. Clark further testified that as of September 30, she had not yet: (1) developed a strategy for his defense;

(2) investigated the facts of this matter; (3) interviewed any of the State's witnesses; (4) considered possible supporting witnesses; (5) fully considered the implications of Mr. Mayfield's past record; (6) prepared for either direct examination or cross examination; or (7) prepared an opening or closing statement. *See id.* at 68-69.

Because Ms. Clark tried the case on the same day she had met Mr. Mayfield and had discussed the merits of the case with him, she did not have time adequately explain to Mr. Mayfield the consequences of testifying in his own defense (*i.e.*, that his prior convictions on similar charges would be admitted into evidence against him) or to arrange for character witnesses to testify on Mr. Mayfield's behalf if he chose to testify anyway. This is no minor issue: both Mr. Mayfield's pastor and his wife were prepared to testify on his behalf at trial, *see id.* at 58-59, 123, but, because Ms. Clark was unaware she would be trying the case, she was unable to secure their attendance and testimony. An effective counsel would have done at least all of these things, especially given the circumstantial nature of the State's case.

As such, having Ms. Clark as trial counsel was akin to not being represented by counsel at all. *See, e.g.*, *Tippins v. Walker*, 77 F.3d 682, 690 (2d Cir. 1996) (holding that defendant was denied effective assistance of counsel when his lawyer slept during parts of trial). Although Ms. Clark was not asleep, her level of preparedness, after a one-hour consultation with Mr. Mayfield, no opportunity to review the case file, prepare questions for witnesses, develop an opening or closing statement, secure defense witnesses, or counsel Mr. Mayfield about testifying in his own defense, rendered her performance almost as ineffective. In her

opinion, her performance was ineffective. *Id.* at 51-59. Because these facts demonstrate that Mr. Mayfield has satisfied both the *Cronic* and/or *Strickland* analyses of ineffective assistance of counsel claims, the state court decision conflicted with this Court's decisions.

A criminal defendant can waive a fundamental constitutional right, such as right to counsel only if: (1) he or she makes the waiver; and (2) such waiver is knowing, intelligent, and voluntary. *See Brady v. United States*, 397 U.S. 742, 748 (1970); *Johnson*, 304 U.S. at 468; *Godinez v. Moran*, 509 U.S. 389, 396 (1993). *See also Faretta v. California*, 422 U.S. 806, 835 (1975). Although a defendant may waive his constitutional right to counsel (which by definition includes the right to effective assistance of counsel), such a waiver must be knowing and voluntary. *See id.*

Moreover, "[b]ecause a defendant has the constitutional right to an attorney, if he does not effectively waive that right, yet is put to trial without the assistance of counsel, his conviction and punishment violate due process." *Wise v. Bowersox*, 136 F.3d 1197, 1202 (8th Cir. 1998) (citing *Faretta*, 422 U.S. at 818).

In this case, the court failed to ask Mr. Mayfield any questions to determine whether he understood that by proceeding to trial with Ms. Clark (who Judge Shepherd deemed ineffective during a brief motions hearing), he would be waiving his right to proceed to trial with effective counsel. Moreover, Ms. Clark's failure to object to Ms. Fishkind's withdrawal from the case does not, and indeed cannot, serve as a knowing and voluntary waiver by Mr. Mayfield. Only a defendant can waive a fundamental constitutional right such

as the right to counsel. *See Faretta*, 422 U.S. at 818; *Brewer v. Williams*, 430 U.S. 387, 404-05 (1988) (court must make every presumption against finding that defendant waived right to counsel).

In this case, Mr. Mayfield never waived his right to counsel. The court never addressed him or conducted any kind of inquiry into whether he wanted to his waive right to counsel, much less followed the mandatory procedures of Maryland Rule of Criminal Procedure 4-215(e) (stating that when a court permits a defendant to discharge an attorney whose appearance has been entered, the court "shall comply with subsections (a)(1)-(4) of this Rule; Subsections (a)(1)-(4) require the court to, among other things, "[i]nform the defendant of the right to counsel and of the importance of assistance of counsel, and [c]onduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel."); *see also Moten v. State*, 339 Md. 407, 411, 663 A.2d 593, 595 (1995) (holding that the purpose of Rule 4-215 is "to protect the most important fundamental right to the *effective assistance of counsel* which is basic to our adversary system of justice.") (emphasis supplied)). The failure to conduct the waiver inquiry in and of itself constituted a violation of Mr. Mayfield's due process rights.

Ms. Clark's failure to object to Ms. Fishkind's withdrawal from the case, moreover, cannot be considered a waiver by Mr. Mayfield. *See, e.g., Faretta*, 422 U.S. at 818; *Brewer*, 430 U.S. at 404-05; *Johnson*, 304 U.S. at 468. This is even more true when considering that Ms. Clark was already deemed to be ineffective counsel by Judge Shepherd.

Applying *Johnson v. Zerbst*, 304 U.S. at 486, and its progeny to the facts of this case, the trial court was

constitutionally required, but failed, to explain to Mr. Mayfield the consequences of proceeding to trial with Ms. Clark as his counsel. Specifically, the court had a duty to: (1) inform Mr. Mayfield that his request for continuance had been denied and that he would be tried that day; (2) explain that he could have Ms. Fishkind represent him, because she was prepared to try the case, or that he could have Ms. Clark represent him, even though she was not prepared to try the case; but that (3) if he chose to have Ms. Clark represent him at trial, he would not be receiving the assistance of counsel to which he was constitutionally entitled; and (4) question him sufficiently to determine that he was making a knowing and voluntary waiver of his right to counsel if he indicated that he wanted Ms. Clark to him represent him anyway. *See Johnson*, 304 U.S. at 464-65. The court could have accomplished this by using the mandatory procedure set forth in Rule 4-215. However, the court neither followed the command of Rule 4-215 nor made any other inquiry to determine if Mr. Mayfield wanted to waive his right to counsel and if he understood the consequences of doing so.

Mr. Mayfield has established that, as a consequence of these errors, he was forced to trial with ineffective counsel through no fault of his own, thus implicating due process. *See MacKay v. Carberry*, 238 F. Supp. 856, 858 (N.D. Cal. 1965) ("if the defendant could make a showing that the predicament he finds himself in on the day of trial is through no fault of his own then due process would be violated to force him to go to with unsatisfactory or unprepared counsel"). For that reason, Mr. Mayfield has established that, in conflict with numerous decisions of this Court, the Circuit Court for Prince George's County, Maryland incorrectly decided that his fundamental rights to due process and counsel were not violated.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

MITCHELL Y. MIRVISS
Counsel of Record
MICHAEL SCHATZOW
TRACEY COHEN PALIATH
VENABLE, BAETJER AND HOWARD, LLP
1800 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201
(410) 244-7400

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION AND ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND DATED AUGUST 20, 2002

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY,
MARYLAND

CT99-1003X

STATE OF MARYLAND

vs.

RONALD JOSEPH MAYFIELD

Petitioner

OPINION AND ORDER OF COURT

Before the Court is the Petition for Post Conviction Relief filed by Ronald Joseph Mayfield, Petitioner/Defendant in the above-captioned case. This Petition was filed pursuant to the Post Conviction Procedure Act, MD. ANN. CODE Article 27, §§645A *et. seq.* (1957, 1996 Repl. Vol., 1998 Supp.) (hereinafter, "the Act"). Hearing on this Motion took place on July 2, 2002. Petitioner's allegations are twofold. First, he claims that his right under the Constitution (both federal and state) to due process and a fair trial was prejudiced by the fact that his counsel was not allowed "adequate time to prepare". Secondly, he claims that he was prejudiced by ineffective assistance of trial counsel; more specifically, the issue is whether or not the public defender's withdrawal immediately before the trial started constituted ineffective

assistance of counsel. The Court finds that it did not and, having also found that his Constitutional rights were not violated, accordingly will DENY the Petition.

PROCEDURAL HISTORY

Petitioner was convicted on October 1, 1999 after a two-day jury trial before the Honorable C. Philip Nichols, Jr. of 2nd-degree storehouse burglary with intent to commit theft, theft over $300, 4th-degree storehouse burglary, theft under $300, and malicious destruction of property. At sentencing, which took place the same day, Petitioner was given a total of fifteen years' incarceration. Later, following a successful Motion for Reconsideration, Judge Nichols reduced the sentence to twelve years. A Motion for New Trial was denied at the same hearing.

Petitioner is seeking relief under the Post Conviction Act based on events that occurred in the weeks leading up to his trial. He had been assigned a public defender, Melanie Fishkind, Esq. There is differing testimony as to when attorney and client actually met, but regardless both testify that by the September 3, 1999 Motions date, Petitioner had grown dissatisfied with Ms. Fishkind and expressed his displeasure on that date to Judge Joseph Casula. Judge Casula explained to Petitioner that he could not assign him (Mayfield) another Public Defender. Petitioner indicated that he would like to retain a private attorney, and Judge Casula informed Petitioner that he would continue the motions for one week. The trial date was still set, as it had been since July, for September 30, 1999.

Appendix A

Petitioner testified at the hearing on his Petition that he did not meet his new attorney, Johnine Clark, Esq., until the morning of September 30. He had only retained Ms. Clark a few days before, and had only spoken to her one to two times prior to September 30. Petitioner testified that it was his impression that September 30 was not going to be the trial date, and that he and Ms. Clark had not even really discussed his case yet. It came as a very rude shock, then, that both Judge Shepherd and Judge Nichols refused to continue the trial on September 30. Petitioner was convicted on all counts, and has initiated these proceedings based on his counsel's unpreparedness for trial.

STANDARD OF REVIEW

Pursuant to §645A(a) of the Act, a petitioner may institute a proceeding in the circuit court for the county to set aside or correct the sentence, provided the alleged error has not been previously or finally waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction. A post conviction proceeding is not a substitute for "any remedies which are incident to the proceedings in the trial court or any remedy of direct review of the sentence or conviction." *See*, § 645A of the Act.

For the purposes of post conviction procedure, an allegation of error shall be deemed to be finally litigated when an appellate court of the State has rendered a decision on the merits thereof, either upon direct appeal or upon any consideration of an application for leave to appeal. *See*, § 645A (b) of the Act.

Appendix A

An allegation is deemed waived when a petitioner could have made, but intelligently and knowingly failed to make, such an allegation before trial, at trial, or on direct appeal, unless the failure to make such an allegation is excused due to special circumstances. *See*, § 645A (c) (1) of the Act. The burden of proving special circumstances shall be upon the petitioner. *Id.*

Generally, where a petitioner fails to make an allegation of error before trial, at trial, or on direct appeal, there is a "rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation." *See*, § 645A(c)(2) of the Act. Where, however, it is a "fundamental constitutional right" that is alleged to have been violated, the Court of Appeals has held that a knowing and intelligent waiver must be made on the record. See *McElroy v. Slate*, 329 Md. 136, 617 A.2d 1068 (1993); *see also State v. Torres*, 86 Md. App. 560, 568, 587 A.2d 582 (1991). "Fundamental rights have been defined as being, almost without exception, basic rights of a constitutional origin, whether federal or state, that have been guaranteed to a criminal defendant in order to preserve a fair trial and the reliability of the truth-determining process." *Wyche v. State*, 53 Md. App. 403, 406, 454 A.2d 378 (1983). A post conviction petition is not a substitute for any remedies which are incident to the proceedings in the trial court or any remedy of direct review of the sentence or conviction. *See*, § 645A (e) of the Act.

The gold standard for ineffective assistance of counsel claims is *Strickland v. Washington*, 466 U.S. 668 (1984). That famous case establishes a two-prong test, both elements of which must be satisfied for there to be a finding of ineffective

assistance of counsel. First, Petitioner must show that trial counsel's performance was deficient; that is, that it fell short of reasonable representation, given prevailing professional norms. *Id.* at 668. Secondly, Petitioner must prove that trial counsel's deficient performance prejudiced the defense. *Id.* at 687. The test is conjunctive; that is, if one prong is not met, the analysis ends, and the other element need not be examined. *State v. Purvey*, 129 Md. App. 1, 10 (1999).

With the foregoing principles in mind, this Court finds the following regarding the Petitioner's specific allegation of ineffective assistance of counsel. In his brief on the Petition for relief under the Post Conviction Act, Petitioner presented three questions:

1. **Was Petitioner's right to due process and a fair trial under the Constitutions of the United States and the State of Maryland violated by the Circuit Court's refusal to allow Petitioner's counsel adequate time to prepare?**

2. **Was Petitioner prejudiced by ineffective assistance of counsel as a result of the public defender's withdrawal immediately before trial started?**

3. **Was Petitioner's right to effective assistance of counsel violated by the Circuit Court's failure to comply with the mandatory requirements of Maryland Rule of Criminal Procedure 4-215?**

At the hearing on July 2, the State moved to sever Questions 2 and 3 as having no place in a post-conviction

proceeding. The Court granted the Motion as to Question 3 but denied it as to Question 2; therefore, the Rule 4-215 issue is no longer before us.

DISCUSSION AND ANALYSIS

Petitioner's conviction arose from a curious situation at First Financial Resources, Inc., in Laurel on April 24, 1999. Police responded to a burglar alarm and found Petitioner removing computer equipment. He informed the police that he was a (former) employee and he was simply taking back his own equipment preparatory to a move. Petitioner was remarkably helpful, even providing his driver's license when asked. When the business owner later assured police that he had, indeed, been robbed, Petitioner was arrested.

Melanie Fishkind, Esq., of the Office of the Public Defender filed her Entry of Appearance on June 28, 1999. Motions were set for September 3, 1999 and trial was set for September 30. Petitioner informed Judge Casula on September 3 that he wanted a new attorney. After inquiring into his reasons, Judge Casula granted Petitioner's request but gave him a deadline of one week in which to retain other counsel. At that time Ms. Fishkind indicated that rescheduling motions for September 10 would not be practicable for her, so Judge Casula continued motions until September 17. The Assistant State's Attorney, Karla Smith, Esq., then said that *that* date would not work for her, so Judge Casula said, "I will continue the motions to the day of trial, which will be the 30th, correct?" (Tr., 9/3/99, p. 8). He added that the Public Defender would stay in the case until petitioner's new attorney entered an appearance.

Appendix A

Petitioner testified that he did not see Ms. Fishkind after September 3 until the day of trial; be that as it may, she was still working in his behalf. For example, the standard investigation by the Public Defender's Office had been initiated on August 24, 1999, and she was keeping abreast of it. Ms. Fishkind still made efforts to compile a cogent case file for trial, even though she knew that, as far as Petitioner was concerned, she was no longer his attorney.

Petitioner utilized the 27 days between the motions date and the trial date by waiting until almost virtually the last possible minute to retain new counsel. He testified that he had called other Gray Panel attorneys without success until he was referred to Johnine Clark, Esq., by his pastor. Clark testified that she was under the impression that the September 30 date was simply motions, and that she would be able to get a continuance of the trial date. Mayfield testified that this was also his belief. However, that is not the way events turned out, and Mayfield's chief complaint is that his attorney was not given the opportunity to prepare an adequate defense.

The Court wonders: exactly whom does Petitioner blame for this? The list is long, but omits the true culprit, Petitioner himself. Petitioner's testimony is that he thought he would get a new trial date when he arrived in court on September 30. He seems to have quite a pronounced case of selective hearing, which is apparent from examining the September 3 transcripts. Judge Casula told Petitioner that he would continue motions for one week so as to enable Petitioner to obtain new counsel. (Tr., 9/3/99, M-7) At that time Ms. Fishkind said she would not be able to appear on

the new date, whereupon Judge Casula granted Petitioner an additional week to find counsel. (*Id.*) *At that point Judge Casula ceased speaking directly to the Petitioner.* The subsequent colloquy he had with the State and Ms. Fishkind had no bearing at all on his earlier direction to the Petitioner that he had until September 17 to get new counsel.

Simply put, Petitioner gambled that his trial would be continued on September 30. He lost. He need look nowhere but at himself when assessing blame. Contrary to Petitioner's assertion in his brief, his belief that the trial would be continued based on statements he overheard the judge and Assistant State's Attorney making at motions was totally unreasonable and not based in reality.

Petitioner also seems to believe the outcome of his trial would have been different had Ms. Clark been more prepared. There is not one scintilla of evidence to support this belief. What Petitioner seems to be ignoring is the fact that he was caught red-handed. Ms. Clark testified at the post-conviction hearing that, while she felt unprepared, she did have a "pretty good handle" on the facts. She was an experienced litigator who had had to appear in court on short notice before. She had an opportunity to cross-examine the State's witnesses against her client. She was not trying to build an alibi defense; rather, she testified that if she had had more time, she would have tried to round up some character witnesses. This was especially important in light of the fact that, despite her urging to the contrary, her client insisted on taking the stand in his own defense. Naturally, at that time his extensive prior record and ridiculous explanation for what he was doing at the scene

of the crime came out, and, especially considering that he had no alibi, one fails to see how the testimony of a character witness is supposed to combat that.

Petitioner was convicted and, in trying to lay the blame at the feet of everyone but himself, ignores the immutable truths of his case. There was a mountain of damning evidence against him, including the fact that the police caught him on the scene at the time of the burglary removing property that did not belong to him. His tale about being there to detail Mr. Miller's car—on a Saturday morning, no less, and when Miller testified that he had never heard word one about this supposed auto detailing business—is so preposterous as to be laughable. In short, Petitioner's trial was fair. His counsel did the best she could—and it is plain from the record that it was as well as Petitioner could have hoped, considering what he gave her to work with. This is a very simple case, and this Court is not convinced that Clark's performance was deficient.

For the reasons stated above, this Court finds that trial counsel's representation of Petitioner was within the bounds of what is considered reasonable. It was professionally rendered and conformed with the standards expected of competent Maryland attorneys. Therefore, there is no need to examine the prejudice prong.

Petitioner's Constitutional claim (Question 1) is predicated on his assertion that his right to the effective assistance of counsel as guaranteed by the Sixth Amendment and the Maryland Constitution was subverted when the Court denied Ms. Clark's request for a continuance on September 30.

In effect, he claims that the Court, through the two judges who denied his continuance request, forced him to go to trial with ineffective and unprepared counsel.

In his brief, Petitioner cites to *Chandler v. Fretag*, 348 U.S. 3 (1954), which states "[A] necessary corollary [to the 6th Amendment right to counsel] is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Id.* at 9. Petitioner here cannot be seriously trying to assert that he was not given "a reasonable opportunity to employ and consult with counsel." His clock started running September 3, when Judge Casula granted his request. If he chose to sit on his hands, that is certainly his business, but he cannot now claim that his attorney was deprived of time in which to adequately prepare. In addition, it is worth noting that the instant case was not Petitioner's inaugural trip into the criminal justice system. He was well acquainted with it, and a reasonable person can infer that he knew how the system worked. He will find scant sympathy here for his fruitless roll of the dice.

Petitioner has cited to a number of cases in his brief that outline the process by which a court determines whether counsel's preparation time is constitutionally adequate. There are, per Petitioner, four steps to consider.

First, the court must consider the amount of time that client and counsel were allowed to confer. Here, testimony is that Ms. Clark and Petitioner spoke for a total of approximately one hour and fifteen minutes before trial. Petitioner himself testified that he and Clark did not even

really discuss his case during their first conversation. Again, this Court is not going to rush to the aid of an individual who treats his defense against serious criminal charges so cavalierly. The important wording above is "the amount of time that client and counsel were *allowed to confer.*" [Emphasis supplied.] It is this Court's view that Petitioner, as of September 3, was "allowed to confer" with any attorney he chose. The Court did not hamstring him in this; Petitioner himself chose to take his time about it.

Secondly, the Court must consider any restrictions placed on defendant's ability to obtain favorable witnesses. *Franklin v. Warden*, 235 Md. 619, 201 A.2d 16 (1964), the case cited in Petitioner's brief in support of this proposition, concerns itself with the impaired ability of defendant to produce *alibi* witnesses. In the instant case, there is no testimony that Petitioner was constrained from producing alibi witnesses; indeed, at the hearing Ms. Clark testified that there was no alibi defense. If anything, Ms. Clark would have liked to have called a Rev. Hines as a character witness. Rev. Hines testified at the hearing that, if asked, he would have given a good character reference to petitioner in September of 1999. This information, when matched against the evidence the State had in this case, is of dubious value at best.

Third, counsel must be provided with adequate time to investigate the facts of the case and map out an appropriate defense. Melanie Fishkind, whom Petitioner summarily dismissed, did investigate the facts of the case. She testified that she did discuss strategy with Petitioner. She had a thorough case file to turn over to Ms. Clark on September 30. Petitioner here would doubtless assert

that *Clark* did not have adequate time to investigate and plan the defense, but the Court would again reiterate that that was due to Petitioner's dilatory actions.

Finally, the complexity of the allegations should be considered. (Petitioner cites to *Jones v. Commonwealth*, 97 F.2d 335, a 6th Circuit case from 1938, for support on this point.) Nothing could be further from reality than to claim that the fact pattern here was in any way complex. There was nothing particularly clever about it. However Petitioner may see himself, he is not exactly James Bond. The State proved that he gained entry to the location by smashing a pane of glass with a brick, and then helping himself to First Financial's property. When confronted by police, Petitioner did prove himself a bold and convincing liar, although of course the driver's license information he willingly provided did end up being instrumental in his arrest. This was in every regard an open and shut case.

This case is about hubris—the hubris of a man who coolly lies to police when caught with both hands deep inside the proverbial cookie jar, and the hubris of a man who is sure he can delay his trial by delaying his acquisition of an attorney. Neither Judge Shepherd nor Judge Nichols was swayed, and this member of the bench is not either.

Appendix A

CONCLUSION

Accordingly, it is this 20th day of August, 2002, by the Circuit Court for Prince George's County

ORDERED, that the Petitioner's Petition for Post Conviction Relief should be and is hereby DENIED.

s/ Graydon S. McKee
GRAYDON S. MCKEE, III
JUDGE

Date: 8/20/02

APPENDIX B — ORDER OF THE COURT OF SPECIAL APPEALS OF MARYLAND DENYING APPLICATION FOR LEAVE TO APPEAL DATED AND FILED DECEMBER 16, 2002

IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND

Application for Leave to Appeal

No. 1849

September Term, 2002

POST CONVICTION

RONALD JOSEPH MAYFIELD

v.

STATE OF MARYLAND

Murphy, C.J.
Eyler, Deborah S.,
Thieme, Raymond G., Jr.,
(Retired, Specially Assigned)

JJ.

PER CURIAM

Filed: December 16, 2002

Appendix B

The application of Ronald Joseph Mayfield for leave to appeal from a denial of post conviction relief, having been read and considered, is denied.

APPLICATION FOR LEAVE TO APPEAL DENIED.

ANY COSTS TO BE PAID BY APPLICANT.